No. 89-1880

In the Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED FREIGHTWAYS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board reasonably concluded that an employer's offer of reinstatement to an unlawfully discharged employee will not toll its backpay obligation where the offer is conditional on its face, regardless of the employee's reason for rejecting it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1880

CONSOLIDATED FREIGHTWAYS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-14a, is reported at 892 F.2d 1052. The Board's supplemental decision and order, Pet. App. 16a-26a, is reported at 290 N.L.R.B. No. 85. The earlier decision of the court of appeals remanding the case to the Board, Pet. App. 27a-42a, is reported at 669 F.2d 790. The Board's original decision and order, Pet. App. 43a-47a, and the decision of the administrative law judge, Pet. App. 48a-74a, are reported at 253 N.L.R.B. 988.

JURISDICTION

The judgment of the court of appeals, Pet. App. 1a-14a, was entered on December 29, 1989. A petition for rehearing with a suggestion of rehearing en banc was denied on March 5, 1990. Pet. App. 75a-76a. The petition for a writ of certiorari was filed on June 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 22, 1979, petitioner discharged employee James Hennessey because he refused to drive a tractor which he reasonably believed to be dangerous. Hennessey filed a grievance challenging his discharge with an arbitration panel established under the collective bargaining agreement between petitioner and Hennessey's union. On May 1, 1979, the panel ordered petitioner to reinstate Hennessey with full seniority and health and welfare benefits, but with a "final warning letter" to be placed in his personnel file and with no backpay. Under the collective bargaining agreement, the warning letter would have permitted petitioner to discharge Hennessey summarily if he refused to drive equipment at any time within the nine months following reinstatement. Pet. App. 2a-3a, 28a-29a, 66a-67a.

Petitioner offered to reinstate Hennessey according to the terms of the arbitration award, but Hennessey refused the offer because it included no backpay. Pet. App. 3a, 18a. After subsequently learning that the offer was conditioned upon acceptance of the final warning letter, Hennessey filed an unfair labor practice charge with the Board alleging that he had been discharged for protected concerted activities in violation of Section 8(a)(1) of the National Labor

Relations Act (the Act), 29 U.S.C. 158(a)(1). Pet. App. 29a, 39a n.14.

2. The administrative law judge found that Hennessey's refusal to drive the tractor constituted protected concerted activity and that his discharge for that refusal violated the Act. He further found that the arbitration award conditioning reinstatement upon acceptance of a warning letter failed to remedy the unfair labor practice and thus did not warrant the Board's deference. Pet. App. 66a, 68a. Finally, the ALJ found that because petitioner had not offered to reinstate Hennessey without the unlawful condition, its backpay liability was not tolled. Pet. App. 68a.

The Board adopted the ALJ's findings. Pet. App. 43a-44a.

3. On a petition for review, the court of appeals concluded that the Board had not addressed the question whether Hennessey improperly refused the offer of reinstatement, but had assumed, as had the ALJ, that his reason was irrelevant to the determination of petitioner's backpay liability. That assumption, in the court of appeals' view, was at odds with prior Board precedent. Accordingly, it remanded the case to the Board "to explicate the circumstances, if any, under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is proper." Pet. App. 35a-41a.

4. On remand, the Board reaffirmed its finding that petitioner's conditional reinstatement offer did not toll its backpay liability. The Board explained that to toll backpay liability, "an employer's offer of reinstatement must be firm, clear and unconditional." Pet. App. 18a-19a. Petitioner's offer, although made pursuant to the arbitrator's award, was on its face conditioned on acceptance of a final warning letter

and therefore "would not have returned [Hennessey] to the position he occupied before the discrimination against him." Pet. App. 19a. To the contrary, the condition constituted an additional unlawful interference with Hennessey's right to invoke the protection of the collective bargaining agreement. "It can hardly be contended that a reinstatement offer that includes what amounts to an independent violation of the Act is [a] valid offer." Pet. App. 19a n.4.

In holding petitioner's reinstatement offer invalid on its face, the Board found it appropriate to focus on the terms of the offer rather than Hennessey's subjective motivation for declining it. Hence, the Board found it irrelevant that Hennessey could not recall being informed of the condition at the time the award was announced. Pet. App. 19a n.4. The Board explained:

> We will not allow a discriminatee's response to an offer invalid on its face to "retroactively validate [an offer] which [was] deficient when made." * * * If, and only if, an offer of reinstatement is fully valid on its face, then an examination of a discriminatee's reasons for declining the offer must be undertaken.

Pet. App. 20a (brackets in original).

The Board found distinguishable the cases cited by the court of appeals, but—assuming arguendo that they required examination of a discriminatee's reasons for declining an invalid reinstatement offer—it overruled them. It adhered instead to the rule stated in *Craw & Sons*, 244 N.L.R.B. 241 (1979), that a discriminatee need not respond to a reinstatement offer that is invalid on its face, and that "a discriminatee's refusal of the offer, on whatever ground, will not relieve the respondent employer of its obliga-

tion to make a valid offer to toll the running of backpay." Pet. App. 21a-22a. That rule

> is fully consistent with the purposes and policies of the Act. * * * [I]t is [petitioner] who acted unlawfully in discharging Hennessey. The equities of the situation fall with Hennessey, the wrongfully discharged employee. It is thus incumbent on [petitioner] to extend to the injured employee a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer. Anything short of this is inconsistent with the statutory policy that a transgressor should bear the burden of the consequences stemming from its illegal acts [citations and footnote omitted]. Because * * * we would require that a discriminatee respond to a facially valid offer and, in those circumstances, would place on him the burden of showing that any refusal of the offer was based on invalid conditions that came to his attention, we believe that our overall policy respecting responses to reinstatement offers establishes a proper balance between the vindication of Section 7 rights and a discriminatee's duty to mitigate damages.

Pet. App. 22a-23a.

The Board thus adhered to its original order directing petitioner to offer Hennessey unconditional reinstatement and back pay from the time of his discharge to the date a valid offer was made. Pet. App. 25a-26a, 46a-47a.

5. The court of appeals modified the Board's order in one respect and granted enforcement. It found that the Board had announced a new rule: "An employer's reinstatement offer must be unconditional on its face in order to terminate the accrual of backpay liability, regardless of the employee's reasons for de-

clining the offer." Pet. App. 2a.[1] It further found that "the Board acted well within its authority in enunciating the new rule and that it had adequately explained how the rule advances the policies of the Act":

> The rule * * * is predicated on a valid offer of reinstatement because restoring the employee to his *status quo ante* is, in essence, the price the employer is required to pay in exchange for the employee's agreement to return to work before the question of backpay liability is finally settled. As [petitioner's] offer would not return Hennessey to the position he occupied before his wrongful discharge, [petitioner] has failed to meet its end of the implicit bargain and, therefore, has no claim to its benefits.

Pet. App. 9a.

The court of appeals rejected, as "border[ing] on the frivolous," petitioner's contention that its reinstatement offer was unconditional. Pet. App. 10a. It also agreed with the Board that tolling petitioner's backpay liability because of its good faith reliance on the arbitration award would, in effect, amount to deferral to the repugnant award, and found that the Board had acted within its discretion in declining to do so. Pet. App. 10a-11a. However, in light of its conclusion that the Board's rule constituted a departure from established precedent, the court of appeals found that the equities supported retroactive application of the new rule only to the date of the ALJ's decision. Pet. App. 12a.

---

[1] The court did not agree with the Board that its decision could be reconciled with earlier precedents, but observed that the Board's authority to enunciate a new rule in an adjudicatory proceeding was undisputed. Pet. App. 7a-8a.

ARGUMENT

1. Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), authorizes the Board, in the event that it finds a violation of the Act, "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the Act. "Because the relation of remedy to policy is peculiarly a matter for administrative competence," this Court has admonished that, "courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). When the Board has exercised its discretion in fashioning a remedial order, the order must stand "unless it can be shown that * * * [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

The Board has long permitted an employer alleged to have unlawfully discharged an employee to toll its potential liability by making a "firm, clear and unequivocal" offer of reinstatement, *Lipman Bros.*, 164 N.L.R.B. 850, 853 (1967), which if rejected by the alleged discriminatee will limit the employer's liability to the period preceding the offer. To effectuate that policy, the Board has held that an offer of reinstatement need not include backpay, and that an otherwise valid offer that is rejected by the alleged discriminatee solely on the ground that it does not include backpay is effective to toll an employer's lia-

bility.[2] *National Screen Products Co.*, 147 N.L.R.B. 746, 748 (1964).

At the same time, the Board has held that an alleged discriminatee need not respond to an offer that is conditional. *NLRB* v. *Seligman & Associates*, 808 F.2d 1155, 1163 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988); *Craw & Sons*, 244 N.L.R.B. 241 (1979); *Lyman Steel Co.*, 246 N.L.R.B. 712 (1979); *Heinrich Motors*, 166 N.L.R.B. 783 (1967), enforced, 403 F.2d 145 (2d Cir. 1968). The requirement of an unconditional reinstatement offer "has the dual purpose of protecting the discharged employee and demonstrating the [employer's] good faith to its other employees." *Heinrich Motors, Inc.* v. *NLRB*, 403 F.2d at 150; *Local 833, UAW* v. *NLRB*, 300 F.2d 699, 703 (D.C. Cir. 1962).

In this case, petitioner's reinstatement offer was concededly conditional on its face, and that condition constituted a further interference with Hennessey's statutory rights.[3] It was insufficient to place Hen-

---

[2] As the court below explained:

> [I]f an employer were required to offer an employee reinstatement with backpay prior to an adjudication on the merits of the discharge, as a practical matter the employer might not be able to recover the backpay in the event of a favorable decision. * * * An employee, on the other hand, would lose little by returning to work without the receipt of accrued backpay, for he would be entitled to recoup it if he ultimately were to prevail on the merits * * *.

Pet. App. 9a.

[3] Although petitioner describes its offer as "apparently" unconditional, Pet. 2, 3, and only "subsequently found not to be valid on its face," it was made "[p]ursuant to the exact terms of * * * [the] arbitration award," Pet. 2, which contained the unlawful warning letter condition. The offer therefore was conditional and invalid at the time it was made.

nessey in the position he would have occupied if he had not been discharged for exercising his statutory rights or to signal to petitioner's other employees its intention to abandon its discriminatory action. The Board therefore reasonably concluded that the purposes of the Act would not be served by permitting petitioner to toll its backpay liability by such an offer, whether or not the improper condition was the reason the offer was rejected. The court of appeals properly deferred to the Board's decision.

2. Petitioner contends, Pet. 7-9, that the Board's refusal to consider a discriminatee's reasons for declining an invalid reinstatement offer conflicts with this Court's decision in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941).

That contention is without merit. *Phelps Dodge* merely holds that the Board could not, on grounds of administrative convenience, decline to determine whether deductions from back pay liability should be made because the discriminatees had willfully refused or abandoned substantially equivalent positions with another employer. 313 U.S. at 199-200. Nothing in *Phelps Dodge* precludes the Board, in allowing employers the option of tolling backpay liability by an offer of reinstatement, from insisting that an employer make a facially unconditional offer before that option comes into play. Since petitioner was the wrongdoer, it was incumbent on it "to extend to the injured employee a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer." Pet. App. 22a.

Nor should the mitigation of damages rule in *Phelps Dodge* be extended to prohibit a discriminatee from rejecting a conditional (and hence invalid) reinstatement offer for reasons other than the unlawful condition. A conditional reinstatement offer, like peti-

tioner's here, signals to employees that the employer continues to adhere to its discriminatory action. Because of its effect on the work force as a whole, such an offer should not toll backpay liability—even if the victimized employee would have rejected reinstatement for some reason other than the unlawful condition.

3. Petitioner further contends, Pet. 9-10, that the Board unreasonably failed to distinguish between a conditional offer made after the employer had been found to have violated the Act, as in *Craw & Sons*, 244 N.L.R.B. 241 (1979), and one made before the Board had found a violation, as was the case here. The Board is plainly well within its authority in determining that a conditional offer does not toll backpay liability in either case. The difference between the two cases, however, is properly taken into account by allowing an employer whose liability has not been adjudicated to offer reinstatement without backpay. See note 2, *supra*; Pet. App. 9a, 44a.

4. Petitioner's contention, Pet. 8, 10, that it is being punished for good faith reliance on the arbitration award ignores the court of appeals' retroactivity ruling. As modified by the court of appeals, petitioner's backpay liability is limited to the period following the ALJ's findings that (1) petitioner violated the Act by discharging Hennessey, and (2) deferral to the arbitration award was not warranted because the condition on Hennessey's reinstatement was unlawful. Petitioner filed no exceptions to those findings before the Board. See Pet. App. 43a n.1. By the time of the ALJ's decision, then, petitioner was aware that it could no longer rely on the arbitration award. As the court of appeals observed, Pet. App. 13a, petitioner knew then that it could toll the

accrual of backpay only by making a new, unconditional offer of reinstatement.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

AUGUST 1990

---

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20047